



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Edward F. Cox
315 State Street
Albany, NY 12201

JUN - 1 2018

RE: MUR 7150

Dear Mr. Cox:

On May 22, 2018, the Federal Election Commission reviewed the allegations in your complaint dated October 11, 2018, and found that on the basis of the information provided in your complaint, and information provided by the respondents, there is no reason to believe that New Yorkers Together and Peter Sikora in his official capacity as treasurer ("NYT") violated 52 U.S.C. §§ 30102, 30103 and 30104 by failing to register and report as a political committee and no reason to believe that NYT violated 52 U.S.C. §§ 30104(c) and 30120(a)(3) by failing to report its mailer as an independent expenditure or include disclaimers in the mailer. Accordingly, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016), effective September 1, 2016. The Factual and Legal Analysis, which more fully explains the Commission's findings is enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 52 U.S.C. § 30109(a)(8).

Sincerely,

Lisa J. Stevenson
Acting General Counsel.

BY: Jin Lee

Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: New Yorkers Together MUR: 7150
and Peter Sikora in his
official capacity as treasurer

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Edward Cox alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act") by New Yorkers Together and Peter Sikora in his official capacity as treasurer.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

New Yorkers Together ("NYT") is registered as an Independent Expenditure Committee with the New York State Board of Elections.¹ During the 2016 general election period, NYT raised \$744,000 and spent \$761,061.31 on independent expenditures opposing the election of four Republican state candidates, including State Senator Kemp Hannon.² State disclosure reports indicate that NYT sponsored nine independent expenditures opposing state senator Hannon's re-election campaign during the general election period: two television advertisements; five mailers; one targeted digital media program; and one radio advertisement.³

¹ Under New York law, an Independent Expenditure Committee is a political committee that only makes independent expenditures and does not coordinate with a candidate, candidate's authorized committees, or an agent of the candidate. N.Y. Comp. Codes R. & Regs. subtit. V, tit 9, § 6200.10(b)(9).

² See New Yorkers Together, NYS Board of Elections: 2016 Off Cycle Report, Schedule C; 2016 11 Day Pre General Report, Schedules C and F; 2016 32 Day Pre General Report, Schedule F; 2016 27 Day Post General Report, Schedules C and F.

³ See New Yorkers Together, NYS Board of Elections: 2016 Weekly/24 Hour Independent Expenditure Report; 2016 32 Day Pre General Report Summary Page and Schedule F; 2016 11 Day Pre General Report Summary Page, Schedule F; 2016 27 Day Post General Report Summary Page, Schedule F.

1 During the same election period, state disclosure reports indicate that NYT sponsored one
2 independent expenditure (a mailer) in support of Hannon's Democratic opponent, Ryan Cronin.⁴

3 Sometime in October 2016, NYT distributed a two-page color mailer opposing Hannon's
4 re-election.⁵ The mailing included the following disclaimer: "Paid for by New Yorkers
5 Together. Not expressly authorized by any candidate, or by any candidate's political committee
6 or any of its agents."⁶ The first page of the mailer includes an image of Donald Trump and
7 states, "THIS YEAR, A WOMAN'S RIGHT TO CHOOSE FACES ITS GREATEST THREAT.
8 .. 'THERE HAS TO BE SOME FORM OF PUNISHMENT FOR WOMEN WHO GET
9 ABORTIONS.' KEMP HANNON SHARES TRUMP'S OUT-OF-TOUCH VALUES." The
10 first page of the mailer ends with the instruction: "VOTE NO ON HANNON."⁷

11 The second page includes an image of Hannon and states, "A WOMAN'S RIGHT TO
12 CHOOSE HAS BEEN LEGAL FOR 43 YEARS. HANNON HAS BEEN TRYING TO
13 CRIMINALIZE IT FOR 40 OF THOSE 43 YEARS. WITH TRUMP THREATENING
14 WOMEN'S HEALTH, THE STAKES ARE TOO HIGH." The second page of the mailer also
15 contains text related to Hannon's past votes and purported positions related to women's

⁴ See New Yorkers Together, NYS Board of Elections: 2016 Weekly/24 Hour Independent Expenditure Report.

⁵ Compl., Attach. ("Mailer"). The record does not indicate the dates on which NYT distributed this mailing. The New York Board of Elections requires that independent expenditure reports include the dollar amount paid for each independent expenditure, the name of person or entity receiving the payment, the date the payment was made, a description of the expense, the election to which the expense pertains, the name of the clearly identified candidate or ballot proposal referenced, and whether that candidate is supported or opposed. N.Y. Comp. Codes R. & Regs. subtit. V, tit 9, § 6200.10(e)(1)(iii). It is unclear how much the subject mailer cost to produce and distribute. State disclosure reports indicate that, between September 28, 2016 and October 7, 2016, NYT disbursed \$193,198.41 in connection with three or more mailings opposing Hannon. See New Yorkers Together, NYS Board of Elections: 2016 Weekly/24 Hour Independent Expenditure Report.

⁶ Mailer at 2.

⁷ *Id.* at 1.

reproductive health and abortion. The mailer includes the following instruction at the bottom of the second page: "VOTE NO ON HANNON."⁸

B. Legal Analysis

1. NYT's Mailer is not an Independent Expenditure Because it Does Not Contain Express Advocacy

An "independent expenditure" is an expenditure by a person expressly advocating the election or defeat of a clearly identified federal candidate that is not coordinated with a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.⁹ The Act and Commission regulations require political committees that make independent expenditures to file reports disclosing their independent expenditures.¹⁰ Persons who make independent expenditures aggregating more than \$250 in a calendar year must also file reports of independent expenditures.¹¹

Commission regulations found at 11 C.F.R. § 100.22(a) provide that a communication expressly advocates the election or defeat of a clearly identified candidate¹² when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or "'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates

⁸ *Id.* at 2.

⁹ 52 U.S.C. § 10101(17); 11 § C.F.R. 100.16.

¹⁰ *See* 52 U.S.C. § 30104(b)(4)(H)(iii) (requiring political committees other than authorized political committees to disclose all disbursements made for independent expenditures).

¹¹ 52 U.S.C. § 30104(c)(1) (requiring every person, other than a political committee, who makes independent expenditures aggregating over \$250 during a calendar year to file reports of such expenditures); *see also* 11 C.F.R. §§ 104.4, 109.10.

¹² The term "clearly identified" means "the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or the 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia.'"

11 C.F.R. § 100.17.

1 described as Pro-Life or Pro-Choice” or uses campaign slogans or individual words, “which in
2 context can have no other reasonable meaning than to urge the election or defeat of one or more
3 clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc., which say
4 ‘Nixon’s the One,’ ‘Carter ’76,’ ‘Reagan/Bush,’ or ‘Mondale!’”¹³ Under 11 C.F.R. § 100.22(b),
5 a communication constitutes express advocacy if “[w]hen taken as a whole and with limited
6 reference to external events, such as the proximity to the election, [the communication] could
7 only be interpreted by a reasonable person as containing advocacy of the election or defeat of
8 one or more clearly identified candidate(s) because— (1) [t]he electoral portion of the
9 communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2)
10 [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or
11 more clearly identified candidate(s) or encourages some other kind of action.”¹⁴

12 The NYT mailer does not contain express advocacy under either 11 C.F.R. § 100.22(a)
13 or (b). Section 100.22(a) is not satisfied because while the mailer clearly urges state candidate
14 Hannon’s defeat — “VOTE NO ON HANNON,”— it does not include similar language as to
15 Trump. It also does not contain campaign slogans or individual words that have no other
16 reasonable meaning than to urge the defeat of Trump, a clearly identified federal candidate.

17 Nor does the mailer contain express advocacy of a federal candidate under Section
18 100.22(b). The mailer focuses on Hannon’s defeat, with one full side of it being devoted almost
19 entirely to Hannon’s record and policy positions. Even though Trump is clearly identified by

¹³ 11 C.F.R. § 100.22(a). The Commission explained that the phrases enumerated in 11 C.F.R. § 100.22(a), such as “Smith for Congress” and “Bill McKay in ’94,” have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,294 (July 6, 1995). *See also* *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is express advocacy when “it provides, in effect, an explicit directive” to vote for the named candidates).

¹⁴ *See* 11 C.F.R. § 100.22(b).

1 name and image and is characterized in unflattering terms, the mailer does not reference his
2 status as a federal candidate, does not mention the presidential election, and does not exhort the
3 recipient to vote against Trump.¹⁵ Significantly, there is no exhortation for *any* action with
4 regard to Trump, and the only directive contained in the mailer, in large, unmistakable letters, is
5 to vote against Hannon. Consequently, reasonable minds could differ as to the interpretation of
6 the mailer. For example, the mailer's inclusion of Trump's statements relating to abortion and
7 his alleged disregard for women's health can be viewed as an attempt to further illustrate the
8 dangers of a Hannon victory or an effort to amplify NYT's negative message relating to
9 Hannon's voting record on those issues.

10 Because NYT's mailer does not expressly advocate the election or defeat of a federal
11 candidate, it is not an independent expenditure and was not required to be reported as such. In
12 addition, while the Complaint alleges that NYT should have included a disclaimer that complied
13 with the requirements of the Act, no disclaimer was required because the mailer did not contain
14 express advocacy.¹⁶ Accordingly, the Commission finds no reason to believe that NYT violated
15 52 U.S.C. §§ 30104(c) and 30120(a)(3).

¹⁵ See MUR 6122 (NAHB) (Commission found no reason to believe respondent made prohibited in-kind contribution because, on the whole, the subject mailer lacked a clear directive to take electoral action and was, therefore, not express advocacy.); MUR 5854 (Lantern Project) (Commission found no reason to believe the advertisements contained express advocacy because the communication's electoral portion was not "unmistakable, unambiguous, and suggestive of only one meaning;" and reasonable minds could differ regarding whether they encouraged electoral, or some other action).

¹⁶ See 52 U.S.C. § 30120(a) (requiring disclaimers for communications expressly advocating the election or defeat of a clearly identified candidate); see also 11 C.F.R. § 110.11(b).

2. There is No Reason to Believe that NYT was Required to Register and Report as a Political Committee

The Complaint alleges that NYT should have registered and reported as a political committee by sponsoring the mailer.¹⁷ The Act defines a “political committee” as any committee, club, association, or other group of persons that receives “contributions” or makes “expenditures” which aggregate in excess of \$1,000 during a calendar year.¹⁸ An organization that has crossed the statutory threshold of \$1,000, however, will not be considered a “political committee” unless its “major purpose” is the nomination or election of a federal candidate.”¹⁹

To assess whether an organization has made an “expenditure,” the Commission analyzes whether spending on any organization’s communications made independently of a candidate constitute express advocacy under section 100.22. As discussed above, the mailer does not contain express advocacy. Further, the Complaint does not allege that NYT distributed any other communications which would constitute expenditures under the Act, or that it accepted any contributions, and we unaware of any such information. Accordingly, the facts do not indicate that NYT met the statutory threshold for political committee status under the Act. Therefore, the Commission finds no reason to believe that NYT violated 52 U.S.C. §§ 30102, 30103, and 30104.

¹⁷ Compl. at 1.

¹⁸ 52 U.S.C. § 30101(4)(A). The term “expenditure” is defined to include “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(9)(A)(i). The term “contribution” is similarly defined by 52 U.S.C. § 30101(8)(A)(i).

¹⁹ See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).